SUPREME COURT OF THE STATE OF NEW YORK
ERIE COUNTY

DEANGELO VEHICLE SALES, LLC,

Creditor/Plaintiff,

v.

ADRIAN LEWIS PETERSON,

Debtor/Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Index No.: 813400/2018

PRELIMINARY STATEMENT

This Memorandum of Law is submitted in support of the instant motion of Plaintiff DeAngelo Vehicles Sales, LLC ("DVS") for summary judgment against Defendant Adrian Lewis Peterson for his default in payment on a promissory note executed by him on October 27, 2019 in the principal amount of $5.2 million (the "Note"). As set forth below, Plaintiff has satisfied the elements necessary to entitle it to judgment in accordance with the terms and conditions of the Note, and its motion should be granted in its entirety.

The facts and circumstances of this matter are set forth in the accompanying Affidavit of Leon C. McKenzie, sworn to August 1, 2019 with attached exhibits (the "McKenzie Affidavit"), the Affirmation of Jeffrey F. Reina Esq. dated August 5, 2019, with attached exhibits (the "Reina Affirmation"); and the Verified Complaint dated August 21, 2018 [Doc. No. 1] (the "Complaint"), and will not be repeated herein at length.

ARGUMENT

PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ITS CLAIM FOR BREACH OF THE PROMISSORRY NOTE BY DEFENDANT

In order to prevail on a motion for summary judgment on a promissory note, "'a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms" *Zyskind v. FaceCake Mktg. Techs., Inc.*, 101 A.D.3d 550, 551 (1st Dept. 2012); *Dvoskin v. Prinz*, 205 A.D.2d 661, 661, (2d Dept. 1994) ("A party establishes her prima facie entitlement to judgment on promissory notes as a matter of law by producing the promissory notes executed by the defendant and by establishing the defendant's default thereon").

Here, each of these elements is established. The Note signed by Defendant on October 16, 2016, is inarguably an unequivocal and unconditional obligation to repay the $5.2 million loaned to him. *Complaint* at Ex. A; *Reina Aff.* at Ex. C. Additionally, the video evidence submitted herein establishes that Defendant was fully apprised of the nature of the instrument he was signing and voluntarily consented to its execution at the time of closing. *McKenzie Aff.* at ¶6, Ex. B. The loan was funded. *Id.* at ¶7, Ex. C; *Complaint* at ¶5. Finally, Defendant has failed to repay the loan as of the date that repayment was due. *McKenzie Aff.* at ¶¶8-10; *Complaint* at ¶7. Accordingly, Plaintiff is entitled to judgment thereon.

Once Plaintiff establishes its entitlement to judgment as a matter of law, "the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense." *Zyskind v. FaceCake Mktg. Techs., Inc.*, 101 A.D.3d 550, 551 (1st Dept. 2012). *Accord*, *Rugg v. O'Donnell*, 159 A.D.3d 1606, 1607(4th Dept. 2018).

While it is expected that Defendant will oppose this motion claiming the need for additional discovery in order to assert such defenses, Defendant has not even alleged any such bona fide defenses. Instead, Defendant has focused his attention on red herrings and the need for discovery in relation thereto. These red herrings include, a purported conflict of interest involving Plaintiff's former counsel in this matter, and the existence of a separate action brought by Plaintiff to recover on a loss of value insurance claim that was assigned to Plaintiff by a former lender to Defendant. [Doc No. 40]. These issues, which arose after the closing and funding of the loan at issue, are extrinsic to the obligations of Defendant under the Note and cannot preclude judgment in favor of Plaintiff. *See*, *Alard, L.L.C. v. Weiss*, 1 A.D.3d 131, 131, (1st Dept. 2003) ("invocation of defenses based on facts extrinsic to an instrument for the payment of money only do not preclude ..." summary judgment.)

Moreover, none of the affirmative defenses set forth in Defendant's Answer are bona fide defenses to a judgment on the Note. In his Verified Answer, Defendant alleges the following affirmative defenses: (i) the damages alleged by Plaintiff are the result of actions of a third party over which Defendant had no control; (ii) unclean hands; (iii) failure to mitigate; (iv) failure to state a claim; and (v) waiver/consent/justification/ratification/estoppel. *Reina Aff.*at Ex. B.

As noted above it is Defendant's burden to put forth evidence to demonstrate that these defenses are bona fide defenses to payment on the Note. *Zyskind, supra*. On the facts presented these defenses are merely conclusory and unsubstantiated allegations that are insufficient to defeat a motion for summary judgment on the Note. *See Dvoskin, supra*, 205 A.D.2d at 662 (holding that assertion that there were several valid defenses to claims on promissory notes, including breach of contract, waiver, estoppel, and release, amounted to nothing more than

conclusory and unsubstantiated allegations which were insufficient to defeat motion for summary judgment on notes).

To the extent that Defendant may claim that discovery is need to flesh out these defenses, mere speculation that something might be discovered is not a proper basis to delay judgment on the Note. *See generally*, *Marshall v. Colvin Motor Parts of Long Island, Inc.*, 140 A.D.2d 673, 674 (2d Dept. 1988) ("The mere speculation that something might be uncovered through discovery provides no basis pursuant to CPLR 3212(f) to postpone decision on the summary judgment motion").

CONCLUSION

By reason of the foregoing, Plaintiff is entitled to judgment as matter of law, and its motion for summary judgment should be granted in its entirety.

Dated: August 5, 2019
Buffalo, New York

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